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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY
COMMISSION, ET AL., APPELLANTS
V.
STATE OF MISSISSIPPI,
APPELLEE

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

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CONSENT OF PARTIES

All parties have consented to the filing of this Amicus Curiae Brief. Letters of consent have been lodged with the Court as of the time of filing.

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NO. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

V.

THE STATE OF MISSISSIPPI

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit, tax-exempt corporation supporting the operations of a public interest law firm. Its goals include, among others, protection of the free enterprise system, attainment of a fair balance between the national government and the States, and preservation of a rational system of criminal justice. All litigation undertaken by LFA is approved by its Board of Trustees, a majority of whom are attorneys. LFA does not accept private fees. It is supported by contributions and grants from individuals, organizations and foundations.

In the present case, LFA's position differs from those of both Respondent State of Missisippi and Petitioner Federal Energy Regulatory Commission ("FERC"). Briefly put, LFA's position is that the District Court's invalidation of section 210 of the Public Utility Regulatory Policies Act ("PURPA") should be affirmed, while the invalidation of Parts I and III of the same Act should be reversed.

As to Parts I and III: These provisions of the Act merely direct States to consider regulatory treatment designed to enable small power facilities and cogeneration to compete in the market. LFA's position is that every new approach that might mitigate the shortage of energy ought at least to be considered. While LFA would generally oppose subsidy of particular meth-

ods of generating energy (because of a belief that the market is a superior means of coordinating consumption and production), the PURPA proposals might well operate in many locations to remove regulation frustrating the market rather than to interfere with the market. More importantly, a request by one sovereign that another merely consider an idea is fully consistent with the latter's sovereignty.

As to section 210, however, LFA notes that the Act requires officers of the State of Mississippi to cease carrying out judgments representing the will of the people of Mississippi and to begin representing the views of FERC instead. This section actually requires State officials to adopt federal policy as State law. LFA reluctantly concludes that this section was properly held unconsitutional by the District Court—reluctantly, because the removal of dysfunctional State regulation in this area is a valuable goal, if the regulation is indeed dysfunctional. LFA simply submits that the danger, in a democratic republic, of forcing the people's representatives to implement the will of another sovereign, however wise and benevolent, instead of the will of the electorate, is greater than the potential benefit here.

SUMMARY OF ARGUMENT

I.

A "republic" is a form of limited democracy in which those with the right of suffrage elect representatives to exercise judgments on their behalf rather than taking action directly. One of the essential attributes of this form of government is the ability to defeat or recall unfaithful representatives. Voters must therefore be able to identify government officials responsible for a policy they oppose. Section 210 of PURPA interferes with this function by misrepresenting the responsibility for controversial, experimental and potentially unpopular regulatory approaches. It thus violates the tenth amendment, the guaranty of a republican form of government, the integrity of the States, and their ability to function effectively in a federal system. National League of Cities v. Usery, 426 U.S. 833 (1974).

II.

The federal government can lawfully carry out policies such as those desired to be implemented here. It can do so by forthright pre-emption of State law, honestly taking upon its elected officials the burden of potentially unpopular legislation.

III.

Parts I and III of PURPA, which merely require consideration of regulatory suggestions, do not misrepresent the locus of responsibility, do not impair the sovereignty of the States, and should not be held unconstitutional.

ARGUMENT AND AUTHORITIES

I. SECTION 210 OF PURPA VIOLATES THE SOVEREIGNTY OF THE STATES AND DENIES THEM THE REPUBLICAN FORM OF GOVERNMENT GUARANTEED BY THE CONSTITUTION.

A. A Requirement that State Officers Adopt Federal Legislation as State Law Misrepresents the Responsibility for Potentially Unpopular Government Action to the Electorate.

If a "republic"—i.e., a representative form of limited democracy—is to function effectively, it is essential that the electorate be sufficiently informed to make intelligent choices among potential representatives. Legislation such as section 210 interferes with that process by confusing, indeed by misrepresenting, the responsibility for potentially unpopular government action. The elected or appointed State official is forced by such legislation to make decisions that, by definition, are not those he would make on behalf of his constituency (otherwise, there would be no need for section 210). But the decision that results is presented to the electorate as that of the State-level, rather than the national-level, government. Voters wishing to change the result could only do so by removing from office the federal offi-

cers responsible for it, while those federal officers have avoided visible responsibility by forcing State officials to adopt the potentially unpopular decision as their own.

To put the matter differently, PURPA's section 210 enables federal administrative and elective officers to camouflage the responsibility for an unpopular decision. The decision finds its expression not in a regulation adopted by the Department of Energy or FERC, but rather in the actions of members of a State-level public utilities commission. If voters wish to turn out of office those who have carried out this unpopular policy, a great many will be induced to vote against current members of the State public utilities commission, irrespective of those members' lack of responsibility or even influence over the legislation at issue. Members might attempt to avoid this result by the dissemination of public information showing that while they adopted the policies at issue, they did so involuntarily; members who take this course, however, will have a difficult burden. Voters who take extraorrdinary steps to inform themselves may know that it is their national congresspersons or senators who should be removed and that their State-level officers are innocent of the offending policy; however, the voters who will be so informed are in the minority. By such legislation as PURPA, an officer of the national government can not only shift blame for a potentially unpopular decision, but insulate it from change by the will of the electorate.

B. This Court's Decisions Indicate that States Have a Compelling Interest in Avoidance of Voter Confusion.

This Supreme Court has repeatedly recognized the interest in avoiding confusion of the electorate. For example, in Storer v. Brown, 415 U.S. 723 (1974), the Court characterized as "compelling" the State interest in accurate voter information about government officials and candidates. There, the Court upheld a California State statute prohibiting defeated primary candidates from running in the general election as candidates of another party or as independents. This California law also prevented poten-

tial candidates from running within two years of changing parties. The Court recognized that serious equal protection and free speech interests were infringed by this legislation, 415 U.S. at 728-29, but held that avoidance of confusion of the electorate was a sufficient interest to overcome this difficulty. Specifically, the California law prevented confusing "stalking horse" candidacies that could "bleed off votes in the general election that might well go to another party." 415 U.S. at 735. The Court concluded,

> A State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist, No. 10 (Madison). . . . We consider that interest as not only permissible, but compelling and as outweighing the interests the candidate and his supporters may have . . . . To conclude otherwise might sacrifice the political stability of the system of the State . . . .

415 U.S. at 736. The confusion engendered by PURPA's misrepresentation of the responsibility for potentially unpopular action is as serious, if not more so, than were the stalking horse candidacies at issue in Storer v. Brown. And if confusion of the electorate was a sufficiently compelling State interest to overcome the first and fourteenth amendment interests infringed in Storer v. Brown, it should overcome the generalized nonconstitutional interest allegedly served by PURPA.

Storer v. Brown is not the only case in which this Court has recognized the important State interest in avoiding confusion of the electorate. In Buckley v. Valeo, 424 U.S. 13, 15-16 (1976), the Court stated:

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential . . . .

Buckley held partly unconstitutional a federal statute that interfered with voter information. Likewise, in Jeness v. Fortson, 403 U.S. 431, 442 (1971), the Court upheld ballot requirements excluding small parties from the ballot in order to avoid a proliferation

of confusing candidates. The Court said,

> There is surely an important state interest [supporting the statute]—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Finally, in American Party v. White, 415 U.S. 767, 782 & n.14 (1974), the Court stated that "preservation of the integrity of the electoral process . . . to avoid voter confusion" was a "compelling" State interest.

C. PURPA Section 210 Has Potential for Voter Confusion at Least as Great as That Recognized as Creating a Compelling State Interest.

But if the voters' desires can be frustrated by a proliferation of candidates, restriction of information or minority parties, they can just as easily be defeated by PURPA's confusion of national and State governmental responsibility. At least one political science textbook advances the idea that most political decisions are made in derogation of public opinion because of the complexity of government:

> [M]any public questions are too technical and involve too many phases to be readily enough understood by the great mass of people to enable them to form intelligent opinions, or . . . the inherent lack of interest of the people erects a barrier to the formation of a rational public opinion. The position is taken that public opinion is of no moment to the routine operation of government and that at best it can be assertive only in the crises . . . . Even then, it lacks incisive understanding and can function only by wholesale impact, it is held. In this view, the intricate business of framing laws and administering them through hundreds of thousands of public officials is in no sense a translation of the will of the voters.

H. BRUCE, AMERICAN NATIONAL GOVERNMENT 80 (1952). PURPA would overlay this existing complexity of government

with what would amount to an actual, if unintentional, misstatement of responsibility. (LFA would add that in the absence of legislation such as PURPA, the pessimistic view advanced by Bruce is unjustified; the electorate manages to effect its will incompletely but nevertheless meaningfully).

Another writer states:

> . . . If knowledge of facts or formation of opinion is blocked, controlled or manipulated, the choice of the voters is debilitated because it is incompetent. . . . What is more, the government must not possess a procedural advantage before the election or at the polls that affects the popular choice.

R. RIENOW, INTRODUCTION TO GOVERNMENT 37 (1952). PURPA's effective requirement that a State commission and its members represent to the voters that they have decided an issue, when in fact the decision has been imposed by the national government, would "block, control or manipulate" the formation of opinion. Furthermore, it would grant to certain officials what Rienow calls a "procedural advantage" that would frustrate the popular choice.

Indeed, such legislation as this is grist for the mill of demagogues. The most undesirable sorts of politicians are those who are adept at exploiting public confusion as to the responsibility for an unpopular action or at trading upon the reality or appearance of defiance of the law. Thus the most troublesome aspect of PURPA section 210 may be the political capital that some politicians might gain by public refusal to follow it. Such politicians could politically embarrass other members of the public bodies to which they belong—those foolish enough, it would be argued, to follow the law. Likewise, new candidates willing to engage in demagoguery could burden law-abiding members with responsibility for an unpopular policy, though knowing that it was required by federal statute.

D. Section 210 Impairs the Integrity of the States within the Meaning of National League of Cities v. Usery, 426 U.S. 833 (1974).

In National League of Cities v. Usery, supra, this Supreme Court invalidated an attempted extension of wage and hour laws to the States, holding that such an effort to use the commerce power to regulate the States "as States" impaired their "integrity" and their "ability to function effectively in a federal system." The present case involves regulation of State functions more intimately connected with sovereignty than were involved in Usery. An order to a State official that he cease representing his constituents, and instead begin representing the views of a federal agency—particularly when coupled with the inevitable effect upon voter perception of responsibility for the policy so adopted—is a more serious "impairment" of sovereignty than wage and hour laws. Usery constitutes persuasive authority for the District Court's invalidation of section 210.

E. Section 210 Violates the Guaranty of a Republican Form of Government.

The Constitution guarantees to each State a "Republican Form of Government." Although definitions vary, it is probably fair to say that a "republic" means a representative form of limited democracy, in which those entitled to suffrage elect representatives who make judgments in the polity's stead, representing the interests of the electorate in doing so. E.g., C. JOHNSON, GOVERNMENT IN THE UNITED STATES 919 (6th ed. 1956).

In adopting the Constitution, the Founding Fathers were heavily influenced by the writings of John Locke. See F. OGG & P. RAY, INTRODUCTION TO AMERICAN GOVERNMENT 27 (10th ed. 1951). In Locke's view, one of the most important attributes of a representative government (i.e., republic) was the ability of voters to remove unfaithful representatives. "[T]there remains still in the people a supreme power to remove or alter the legislative [power], when they find the legislative act contrary to the trust imposed in them." J. LOCKE, OF CIVIL GOVERNMENT 192 (Best Printing Co. ed. 1943). Indeed, Locke viewed this ability as a feature of all valid governments:

> And thus the community perpetually retains a supreme

> power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or wicked as to lay and carry on designs against the liberties and properties of the people.

Id.

Locke further concludes that the legislator's duty to his constituents transcends that to any central authority. He hypothesizes the existence of a supreme national power, such as a monarch or an executive having authority over the legislature; in this event, Locke concludes, that central authority may override the decisions of the legislators assembled, but the legislators must nevertheless continue to serve as "fiduciaries" to their electorates. Id. at 193-94. These and related concepts formed the basis of language in the Declaration of Independence recognizing the right of peoples to "alter or abolish" governments that no longer had their just consent. The Founders unquestionably had John Locke's ideas firmly in mind when they drafted the guaranty of a republican form of government.

Section 210 of PURPA defeats these goals by frustrating the ability of the voter to identify and hold accountable unfaithful representatives. It would further impair the fundamental nature of a republican form of State government by requiring subordination of the "fiduciary" aspect of representation. Finally, it would contradict the notion of the limited central sovereign, whose exercise of authority inconsistently with the duties of representatives was, in Locke's view, fundamentally violative of the principle of representative government.

II. THE NATIONAL GOVERNMENT CAN ACCOMPLISH ITS GOALS LAWFULLY BY PRE-EMPTIVE FEDERAL LEGISLATION, RATHER THAN BY REQUIRING STATE OFFICERS TO ADOPT FEDERAL POLICY AS STATE LAW.

None of the analysis given above indicates that the federal government is powerless to deal with the problem at issue. The federal Congress could itself act to exempt small power facilities or

cogeneration from State regulation to the extent deemed necessary or appropriate. For it to do so in its own name would not make merely a trivial difference. It would mean that if the electorate disagreed with the approach taken, it would have insight into the responsibility for it and the means to correct it.

The national government, it should be added, has a lengthy and infelicitous history of regulation in the energy area. Its regulation of wellhead prices of natural gas sold in interstate commerce, for example, created shortages of the commodity by discouraging production while encouraging wasteful consumption. The States generally avoided this result as to gas sold in intrastate commerce, which was not subject to federal control. The absence of such federal control meant that misguided federal policies were not forced upon State governments. Federal policy as to coal and nuclear energy has created some of the same sorts of problems. Recently, enactment of the Powerplant and Industrial Fuel Use Act ("PIFUA") has been advanced, much as has PURPA here, as leading to better resource allocation; even more recently, however, it has been widely suggested that PIFUA would be inferior to the market and even that the fuel uses legislated by PIFUA are inefficient, and there have been many calls for its repeal.

The argument has been made, in this case, that the PURPA section at issue is preferable to pre-emptive federal legislation since it enables State officials to exercise maximum discretion to choose among policies acceptable to the federal government. The power to require State representatives to choose in this manner, however, may amount to a power to force a choice among failed alternatives. State officials may well deem the existence of such "discretion" inferior to the ability to either make their own mistakes or have the national government take responsibility for them.

III. PARTS I AND III OF PURPA DO NOT APPEAR TO BE IMPERMISSIBLE ENCROACHMENTS ON STATE SOVEREIGNTY.

Parts I and III of PURPA require only that States consider regulatory approaches suggested by the national government. No

sanctions are provided for the failure to undertake this consideration; furthermore, there is no requirement that the States adopt any of the suggested approaches, nor is there any sanction for rejecting them. These Parts do not appear to be an impermissible encroachment upon State sovereignty. Unlike section 210, these Parts do not force State officers to adopt federal policy in derogation of their constituents' perceived interests, nor do they require them to be any the less "fiduciaries" for the citizenry, nor do they interfere with the independence of State judgments, nor do they misrepresent responsibility for the action taken.

Sovereigns might very well respect each other's proper role, but still wish to make non-binding suggestions to each other. The States, in fact, do so frequently with respect to the national government. State legislatures pass resolutions memorializing the Congress on such diverse issues as busing, national defense or the impact of federal enclaves on local interests. The legislation here in question, Parts I and III of PURPA, is simply another form of such a suggestion exchanged among sovereigns.

It is true that PURPA is written in language that would ostensibly order, rather than request, the States to undertake the desired consideration. A purist might take this feature as an insult to sovereignty, and indeed it might have been preferable had the national government requested, rather than required, these parallel sovereign States to consider a matter that is within their authority. However, to invalidate the legislation on this ground would be excessively to exalt form over substance. The difference between a requirement that another sovereign consider a suggestion, and the making of a suggestion without the requirement that it be considered, is insubstantial given the context and effect of Parts I and III. The problem that this legislation addresses—the efficient generation of power—is compelling in importance, and all possible approaches ought to be considered; a State that does not wish to adopt the PURPA suggestions is free to reject them, whether the reason is adoption of a better approach, a desire to avoid uncertain departures from older ideas, or simply a manifestation of independence from federal control. Such rejection by individual States would be preferable to denunciation of the national govern-

ment's entire effort to communicate its suggestions on a matter of such great importance to both sovereigns.

CONCLUSION

The Court should render an opinion that recognizes the interest of Mississippi in its sovereignty. Amicus would suggest that under such an approach, section 210 appears to be unconstitutional. The other portions of the Act invalidated by the District Court, however, do not distort responsbility, do not force State officers to neglect what they perceive to be their constitutents' interests, and amount to nothing more than an exchange of suggestions between sovereigns. These latter parts do not appear to be unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have accomplished service of this brief prior to filing by depositing in a United States Post Office, namely the central post office at Houston, Texas, postage first class prepaid, three copies to each of the following, in accordance with Rule 28.3 of the Rules of this Court, addressed to: Rex E. Lee, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and Bill Allain, Attorney General of Mississippi, Jackson, Mississippi.